Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In Re Applications of	)	MM Docket No. 93-75
	)	
TRINITY BROADCASTING OF FLORIDA, INC.	)	BRCT-911001LY
	)	
For Renewal of License of Television Station WHFT(TV) Miami, Florida	)	
	)	
GLENDALE BROADCASTING COMPANY	)	BPCT-911227KE
	)	
For Construction Permit Miami, Florida	)	

To: Hon. Joseph Chachkin
Administrative Law Judge

REPLY TO OPPOSITION TO
MOTION TO DISMISS APPLICATION

TRINITY BROADCASTING OF FLORIDA, INC.

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June 17, 1993

TABLE OF CONTENTS

SUMMARY

Glendale has failed to demonstrate why its application should not be dismissed as ungrantable for lack of site availability.

On the face of the document, there was no acceptance by [redacted]

Accordingly, as the Mass Media Bureau recommends (based on non-acceptance of the offer), Glendale's application should be dismissed without hearing as ungrantable for lack of an available transmitter site.

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owner's offer expired when Glendale failed to deliver an executed acceptance by January 31, 1992, and (2) in any event, TBF's lease rights on the same tower bar access by Glendale for two full years after all FCC proceedings and judicial appeals in this case have ended. TBF further showed that, under applicable Commission law, an applicant lacking an available site has an ungrantable application and is subject to dismissal without a hearing.

2. The Mass Media Bureau supports the dismissal of Glendale's application if the Presiding Judge finds (as shown below) that Glendale did not timely accept the written offer made by the site owner, Tak Broadcasting Company ("Tak"), to negotiate a lease for the proposed site. MMB Comments, p. 14.

3. Glendale asserts that it did timely accept the offer by signing the offer letter and mailing it back. This, says Glendale, was enough to create an acceptance before the offer lapsed, even if Tak never received the return letter. Moreover, claims Glendale, Tak is presently willing to negotiate with Glendale for a lease if Glendale prevails in this proceeding. According to Glendale, this moots any issue about the availability of the proposed site.

4. With respect to TBF's two-year holdover right under Section 10 of the tower lease, Glendale disputes that right and accuses TBF of abusing process by even raising it. In

Glendale's view, TBF's lease rights would be terminable by Tak on 30 days notice as soon as TBF lost its FCC license, because (says Glendale) TBF would then be in default. Glendale further argues that any ambiguity in the lease must be resolved by the courts, and that, absent a judicial ruling in its favor on the point, TBF has not adequately shown that Glendale would lack access during the two-year period. Besides, claims Glendale, its FCC construction permit would probably extend beyond the two-year period anyway.

5. For the reasons set out below, Glendale's position is without merit and its application must be dismissed. Even viewing the disputed facts in a light most favorable to Glendale, it is absolutely clear that Glendale never executed a valid acceptance of Tak's offer, and that the offer therefore lapsed on January 31, 1992. Moreover, Glendale has not overcome the legal presumption that because its purported "acceptance" unquestionably was not received, it was not mailed. Whether Tak is <u>now</u> willing to deal with Glendale is irrelevant, since Glendale lost its site more than 15 months ago and clearly lacks the requisite good cause to reinstate its long-defective proposal. And, contrary to Glendale's contention, TBF's two-year holdover right under the tower lease is unambiguous and leaves Glendale without access to the site. Thus, as the Bureau recommends (based on non-acceptance of the site owner's offer), Glendale's application should be dismissed.

B. Tak's Offer to Glendale Expired

1. There Was No Acceptance by Glendale

6. On the face of Glendale's own submission, it is clear that Glendale never executed a valid acceptance of Tak's offer. The offer came in a detailed and precisely worded three-page letter of intent dated December 9, 1991, addressed to Gregory B. Daly of TelSA, Inc. (the "Offer Letter").[2/] On the last page (appended hereto as Attachment 1), signature lines for two parties were placed under the word "ACCEPTED:" -- one line for **"Glendale Broadcasting Corporation"** and the other line for **"TelSA, Inc."** Beneath each signature line was a line on which the title of each party signatory was to be inserted, and separate signature lines were provided for witnesses to each of the two parties' signatures.

7. The Offer Letter was very clear as to why separate signatures for both Glendale and TelSA were being required:

> "This agreement is only between TBC [Tak] and Glendale and the inclusion of TelSA, Inc. is only for the purpose of limiting TBC's tender of and TelSA's acceptance of this agreement as full compensation for any service it may have rendered to TBC in the

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2/ The letter of intent is attached to the Declaration of Gregory B. Daly, which in turn is Attachment 1 to Glendale's "Opposition to Motion To Dismiss Application." For ease of reference, the letter of intent will be referred to here as the "Offer Letter."

course of serving it's [sic] client and is

by the offeree in a manner invited or required by the offer."[4/] In this case, the document that was (allegedly) mailed back to Tak contained no manifestation of assent by offeree Glendale at all, let alone in the manner required by the Offer Letter, i.e., a witnessed signature on the prescribed Glendale signature line. By definition, therefore, Glendale did not accept the offer.[5/]

states that Daly was hired "to locate a transmitter site" and that Glendale "authorized Mr. Daly to negotiate with Mr. Sorensen." Opposition, p. 3 (emphasis added). Daly's own declaration avers only that "[w]ith the express authorization of Glendale, I negotiated" with Tak.[6/] Neither Glendale nor Daly asserts that he had been authorized to sign the agreement for Glendale as well -- and the notable absence of his signature on the Glendale line indicates that Daly himself believed he lacked such authority. It is one thing for an individual to negotiate on behalf of a party; it is quite another thing for that person

2. Glendale Has Not Rebutted the Presumption That No Acceptance Was Mailed to Tak

13. Because Glendale's failure to execute a valid acceptance is dispositive whether or not the letter was mailed, there is no need to reach the issue of mailing. Nonetheless, TBF notes that Glendale has not met its burden of showing that the letter was in fact mailed to Tak. When receipt is at issue, the Commission will apply the presumption of regularity of the mails and find that an item mailed has been received by the addressee. Juan Galiano, 5 FCC Rcd 6442 (¶5) (1990). However, receipt is not at issue in this case. Here, it is undisputed that Tak did not receive anything from Glendale. The dispute here is whether the item was mailed. When the issue is mailing, and nothing has been received, the presumed regularity of the mails creates the presumption that nothing was mailed. While that presumption is rebuttable, rebuttal evidence must be persuasive because the presumption is strong.1/

1/ The fact that Tak received nothing from Glendale is established by the sworn Affidavit of Tak's Tower Manager and Chief Engineer, James L. Sorensen (Att. 2 of TBF's Motion To Dismiss), stating unequivocally that Glendale did not execute the letter of intent. Mr. Sorensen confirms this statement in the (unsworn) "telefax" he sent to Glendale's counsel, Lewis Cohen, on May 15, 1993 (submitted with Mr. Cohen's declaration in Att. 2 of Glendale's

14. Glendale's evidence is legally insufficient to rebut the presumption that the unreceived letter was not mailed. The rebuttal consists solely of Mr. Daly's self-serving claim that he "personally mailed" the letter on December 21, 1991. (Daly

written offer/acceptance with such a transmittal. Similarly, common business practice includes the transmission of important

17. There are further unexplained curiosities. Mr. Daly does not explain why his signature lacks a witness, even though the Offer Letter required the two acceptance signatures to be witnessed. The absence of a witness, of course, makes it impossible to verify Daly's claim that he signed the letter when he says he did. Daly likewise does not explain how he can state with ostensible certitude almost 18 months after the fact that he mailed the letter to "P.O. Box 5333, Ft. Lauderdale, FL 33130" (Daly Declaration, pp. 1-2), when he has no documentary record of the alleged mailing. His statement is plainly based, not on any recollection, but on the fact that the address he recites appears on Tak's letterhead at the bottom of the first page of the Offer Letter (and even with that Daly misstates the zip code). Thus, his recitation of Tak's address does nothing to support his claim that he mailed the letter.

18. While Mr. Daly says that he signed the Offer Letter "[a]fter conferring with Glendale" (Daly Declaration, p. 1), he does not identify the person(s) with whom he allegedly conferred, and there is no corroborating declaration from Glendale. Neither George Gardner nor Attorney Cohen, in their respective declarations, mentions any such pre-execution discussion with Daly.

19. Yet another unexplained circumstance is the highly unusual presence of two different "Received" stamps on the first page of Mr. Daly's copy of the Offer Letter. One bears the date

"DEC 20" with the year covered up, while the other bears a date (not fully legible) that appears to be either "DEC 20" or "DEC 26" of 1991.[9/] There is no explanation of why the document would have been stamped twice if the first stamp was accurate, why a second stamp was affixed if it merely duplicated the date shown by the first stamp, or why part of the date on one of the stamps has been masked out.

20. Finally, Mr. Daly's declaration conspicuously fails to state when the handwritten notation below his signature ("copy mailed 12/21/91 to TAK") was placed on the document. The intended implication, of course, is that it was placed there contemporaneously, but Daly's failure to so state in his declaration negates that conclusion. Because there was evidently no witness, independent verification would be possible only if the original of the handwritten notation were submitted for examination by an expert analyst.

21. With such a deficient and unreliable response, Glendale has completely failed to rebut the strong legal presumption (based on the presumed regularity of the mails) that the unreceived document was never sent to Tak. Hence, the unrebutted presumption controls, compelling the conclusion that

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[9/] If the Offer Letter was in fact not seen by Mr. Daly until December 26, 1991, that would be critically significant, since Mr. Daly is claiming that he signed the letter on December 21, and George Gardner signed Glendale's application (with its site certification) on December 24.

because no acceptance was mailed, Glendale did not accept Tak's offer before it expired on January 31, 1992.

C. The Lapse of Reasonable Assurance Defeats Glendale's Site Proposal

22. Citing Rancho Mirage Radio, a General Partnership, FCC 90M-2252, released July 26, 1990 (ALJ), Glendale contends that because the Tak site was available to Glendale when it filed its application in December 1991, and because (says Glendale) the site is available now, no site availability issue (and presumably no dismissal) is warranted. Opposition, pp. 5-6. This contention is without merit.

23. Even assuming that Tak is willing now to make a current arrangement with Glendale, that does not cure the 15-month gap between February 1992 and May 1993 during which Glendale had no assurance of access to the site because Tak's original offer had lapsed. To lose that assurance was to lose the site. Thus, although Glendale never amended its application to report that it was without a site, it was in fact without a site and thus lacked an operative engineering proposal.[10/] Reinstatement of reasonable assurance for the Tak site 15 months

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10/ 62 Broadcasting, Inc., 4 FCC Rcd 1768, 1772 (Rev. Bd. 1989) (where applicant lacked reasonable assurance of site availability, "the FCC Form 301, Section V, engineering data was incorrect on its face and entirely moot"); Great Lakes Broadcasting, Inc., FCC 93-263, released June 11, 1993, n. 4 (engineering specified in application that lacks site availability is "analogous to a situation in which no engineering information at all ha[s] been filed").

later is tantamount to a new site proposal, since it is a change

elected to omit a necessary signature, it now must bear the consequences of that decision.

26. Glendale likewise fails the due diligence test. Articulating the due diligence standard, the Commission has [illegible] stated that "an applicant must show that it acted

if the offer was not timely accepted, Glendale's failure to take those elementary precautions was careless in the extreme.[11/]

28. Glendale's reliance on Rancho Mirage is misplaced. In that case, there was no lapse of reasonable assurance from the site owner. At all times the site owner considered that it had a meeting of minds with the applicant, notwithstanding that the applicant had inadvertently specified the wrong location in its application. Here, to the contrary, there has been a period of

the terms of the Offer Letter that its failure to accept by the

Broadcasting Co. v. FCC, 762 F.2d 138 (D.C. Cir.), cert. denied, 106 S.Ct. 410 (1985). As these cases demonstrate, an applicant has no right to proceed to hearing when it has lacked reasonable assurance of site availability and is barred from amending.

D. **TBF's Lease Leaves Glendale Without Access**

30. Wholly apart from Glendale's loss of reasonable assurance for failure to have accepted the Tak offer, Glendale's access to the site is barred by TBF's two-year holdover right under the tower lease. There is no merit to Glendale's contention that TBF really does not have a holdover right under the lease, or that the lease is at best ambiguous on the point. Opposition, pp. 7-8.

31. In the first place, Glendale's argument proves too much. If indeed the lease is ambiguous as to whether Tak can make TBF's tower space available to Glendale during the two-year holdover period, then the very existence of that ambiguity defeats Glendale's reasonable assurance of site availability.

32. Beyond that, however, the lease is not ambiguous at all.[13/] Section 10 very specifically extends the lease, and thus TBF's right to the tower space under the lease, until the end of "a two (2) year period following conclusion of administrative and Court proceedings and appeals . . . resulting in final termination of [TBF's] broadcasting privileges."[14/] Contrary to Glendale's claim, this very specific provision is not overridden by the far more general Section 5, which requires TBF to operate "in a lawful and proper manner and in accordance with standards imposed by the Federal Communications Commission." Indeed, Section 10 controls, because "[i]f the

33. The very specific provisions of Section 10 of the lease (the holdover provision) would plainly be nugatory if FCC denial of TBF's renewal application would ipso facto put TBF in default of Section 5 and permit the lessor to terminate immediately, as Glendale claims. Since the contracting parties obviously did not intend Section 10 to be nugatory, Glendale's argument is patently flawed.[15/]

34. Equally without merit is Glendale's suggestion that without a judicial interpretation of TBF's tower lease, the two-year holdover clause cannot be found to bar Glendale's immediate access to the site. Opposition, p. 8. That suggestion presumes that the lease "is ambiguous." Id. As discussed above, however, the lease is not at all ambiguous. And even if it were, the existence of a legal dispute on the point defeats Glendale's present reasonable assurance. Kaldor Communications, Inc., supra. Moreover, the Commission routinely evaluates for itself the meaning of provisions in legal documents between private parties that bear directly on its regulatory concerns. See, e.g., RKO General, Inc. (WAXY-FM), 2 FCC Rcd 3348, 3350-51

15/ What Section 5 plainly means is, not that TBF must at all times be operational, but that its operation must comply with FCC rules -- a very different matter. For example, Section 5 would protect the tower owner (Tak) if TBF operated with excess power, or without type-accepted equipment, or in violation of RF exposure guidelines. In the context of the point raised in this proceeding by Glendale, TBF would violate Section 5 only if it continued to engage in broadcast transmissions after being ordered off the air by the FCC (something it would not do).

(ALJ 1987) (construing trust agreement governing George Gardner's CATV stock); Catherine L. Waddill, 8 FCC Rcd 2169, 2169-70 (¶¶3-5) (1993) (construing provisions of limited partnership agreement); Roy R. Russo, Esq., 5 FCC Rcd 7586 (MMB 1990) (analyzing provisions of time brokerage agreement). The cases cited by Glendale are inapposite.[16/]

35. Glendale argues in the alternative that the Tak site should be considered available to Glendale notwithstanding the two-year holdover period. Opposition, pp. 11-13. In this regard, Glendale theorizes that its two-year construction permit might very well not be issued until long after finality in this proceeding, in which case TBF's two-year holdover right would expire before Glendale's construction permit expired. That contention, however, is purely speculative and is supported by nothing more than Glendale's reference to a single instance in which an FM (not TV) permit was issued several months after initial grant of the application. That is no indication of

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16/ In KQED, Inc., 6 FCC Rcd 625 (1991), the legal issue involved a matter plainly outside the Commission's authority, namely whether a nonprofit entity could be required to turn over its assets to another party. In Ninety-Two Point Seven Broadcasting, 55 RR 2d 607 (1984),